Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

FISCHBACH & MOORE, INC.,

Petitioner,

v.

LAWRENCE MOORE,

Respondent.

Petition For Writ Of Certiorari To The United States District Court For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court grant certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit that an employer association and a union cannot engage in arms' length collective bargaining which results in an attorney fee-shifting provision affecting non-prevailing union members who engage in vexatious, bad-faith litigation?

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Paul Blackwood
Ron Cooper
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In The

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October Term, 1995

FISCHBACH & MOORE, INC.,

Petitioner,

v.

LAWRENCE MOORE,

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Petition For Writ Of Certiorari To The United States District Court For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Fischbach & Moore, Inc., respectfully prays that a Writ of Certiorari issue to review the decisions of the United States Court of Appeals, Ninth Circuit, entered on May 5, 1995 and May 8, 1995, and its subsequent denial of the Petitions for Rehearing on June 22, 1995.

OPINIONS BELOW

Respondent Lawrence Moore ("Moore"), a union member, brought an action against one of his employers,

Fischbach & Moore, Inc.[1] ("Fischbach"), and his local union, Local 569 ("Union") of the International Brotherhood of Electrical Workers ("IBEW"), alleging a violation of the applicable collective bargaining agreement and the Union's duty of fair representation. Fischbach prevailed after a jury verdict and moved for an award of attorney fees under the "Inside Agreement Between Local 569 And The San Diego Chapter Of The National Electrical Contractors Association" ("Inside Agreement"). The Inside Agreement had an attorney fee provision which required a party who unsuccessfully tried to set aside a binding arbitration decision to pay attorney fees to the prevailing party.

The United States District Court for the Southern District of California upheld the Inside Agreement and referred the issue to arbitration for determination of the reasonableness of attorney fees. The arbitration committee considered the matter and awarded $244,104.01 in attorney fees to Fischbach. Upon petition by Fischbach, the District Court confirmed the award and entered judgment against Moore accordingly. Moore appealed, in case No. 93-56717, asserting that the Inside Agreement's attorney fee provision did not apply to him. On May 5, 1995, the Ninth Circuit decided that the fee provision violates the rights of members of labor organizations under 29 U.S.C. Section 411(a)(4) due to a "chilling effect" on lawsuits by such members. (App. 1-13). The Court of Appeals denied Fischbach's Petition for Rehearing on June 22, 1995. (App. 25-26).

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[1] A list of related companies of the corporation is appended hereto pursuant to U.S. Sup.Ct. Rules, Rule 29.1. (App.29-32).

A related case, No. 94-55120, decided on May 8, 1995, dealt with Moore's appeal of the District Court's order which disbursed the proceeds of a supersedeas bond to various creditors of Moore, including Fischbach. Fischbach was a creditor in the amount of the attorney fee award reversed by the case discussed above. The Ninth Circuit held that, since it reversed the award of attorney fees, Fischbach could not state a claim against the supersedeas bond. (App. 14-19). The Court of Appeals denied Fischbach's Petition for Rehearing in this case as well. (App. 27-28).

Another related case, No. 94-55876, also decided on May 8, 1995, dealt with Moore's appeal of the District Court's dismissal of an action on res judicata grounds. The District Court dismissed the latter action because Moore's claim in the case discussed first above and the latter action centered on the same provision of the Inside Agreement. Moore contended the District Court did not properly apply res judicata principles. Due to the fact that the Ninth Circuit reversed the District Court's determination in the first action, the District Court's determination in the latter case fell and the case was remanded for further proceedings. (App. 20-24).

JURISDICTION

The decisions of the United States Court of Appeals, Ninth Circuit, were entered on May 5, 1995 and May 8, 1995, and rehearing was denied on June 22, 1995. This Court's jurisdiction to consider this petition from the

decisions of the Ninth Circuit is invoked pursuant to 28 U.S.C. Section 1254.

STATUTORY PROVISION INVOLVED

The statutory provision herein involved is 29 U.S.C. Section 411(a)(4) which provides as follows:

> No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further,* That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari involves a question of exceptional importance. Can an employer association and a union engage in arms' length collective bargaining which results in an attorney fee-shifting provision affecting non-prevailing parties who engage in vexatious, bad-faith litigation? The United States Court of Appeals for the Ninth Circuit answered this question in the negative. Petitioner Fischbach will explain why, in this case and cases like it, the answer to the above question should be in the affirmative.

In the present case, the San Diego chapters of IBEW and an employer association of which Fischbach is a member, the National Association of Electrical Contractors ("NECA"), negotiated in good faith to achieve a collective bargaining agreement, the Inside Agreement. Part of that agreement contained an attorney fee provision which empowered a court to award attorney fees to the prevailing party in a suit challenging *final binding arbitration decisions.*

The issue arose on appeal as to whether the risk of such an award would impinge on a union member's right to bring suit under 29 U.S.C. Section 411(a)(4). The Ninth Circuit concluded that such risk would have a chilling effect on union members' right to sue and that, therefore, the provision can *never* be applied to a union member regardless of whether the member pursues litigation in bad faith.

Counterbalanced against the union members' rights, however, is the importance of achieving finality in the judicial process, and of preventing – and yes, chilling –

bad faith, vexatious litigation. In this case, if there is no risk for Respondent Moore in his pursuit of seemingly endless litigation, the public policy and legislative determination which supports the finality of binding arbitration becomes meaningless. Additionally, the public policy against vexatious, bad-faith litigation is eliminated de facto.

Fischbach, at all times material hereto, was an employer within the meaning of Section 2(2) of the Labor Management Relations Act ("LMRA") [29 U.S.C. § 152(3)]. Both Fischbach and its fully owned subsidiary, Corbin-Dykes, were signatories to various collective bargaining agreements, as that term is defined in Section 301 of the LMRA [29 U.S.C. § 185], with Union. Union is a labor organization within the meaning of LMRA Section 2(5) [29 U.S.C. § 152(5)] and Section 402(i) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") [29 U.S.C. § 402(i)]. IBEW is the parent union of Union and is also a labor organization within the meaning of both the LMRA and the LMRDA. At various times relevant hereto, Moore was a member of Union and IBEW.

Union has jurisdiction over all electrical construction, manufacturing, installation, sound, street lighting and marine work within the general geographic area of San Diego County, California. In that capacity, Union negotiates various collective bargaining agreements on behalf of persons for whom it is the exclusive collective bargaining representative.

The collective bargaining agreement involved in this appeal is the Inside Agreement. This contract is a multi-employer agreement which covers the performance of

construction-site electrical work. Among other things, the Inside Agreement governs the wages and terms and conditions of bargaining unit members who worked for employers who were signatory to the Inside Agreement either through membership in NECA or who independently assented to the contract. Additionally, pursuant to Section 1.06 of the Inside Agreement, the prevailing party in any dispute brought under the Inside Agreement is entitled to its attorney fees. Section 1.06 provides in pertinent part:

> Should any party hereto or any employee subject to the provisions of this Section and Agreement engage in or initiate any legal proceedings attacking, challenging or seeking to set aside either as a whole or in part the final decision of an arbitration, appeals or appellate body established pursuant to this Agreement, or who cause any action to be brought before any court or administrative body in contravention of this Section, who is unsuccessful in such endeavor, shall pay the reasonable costs and attorney fees of the party prevailing in such action or litigation. The amount of the costs and attorney fees to be paid by the person engaging in legal or administrative proceedings seeking to set aside the decision of a dispute resolution body as set forth hereinabove shall be determined by the Labor-Management, CIR or Appeals Committee established under the provisions of this Agreement, whichever is applicable.

Moore has brought numerous suits against everyone involved in this body of litigation, including judges and

attorneys.[2] Fischbach believes Moore has acted in bad faith in so doing. If the attorney fee provision cannot be enforced, at least in cases like this, an improper message is sent to potential litigants: that litigation amounting to extortion is acceptable and without risk. Furthermore, the legislative policy which supports the finality of binding arbitration is totally undermined.

Fischbach employed Moore, a union electrician, on one job for eight days in May of 1986. When the job was finishing up, Fischbach let Moore go. Moore claimed that he worked three hours of overtime for which he had not been paid. Fischbach disagreed. Moore complained to Union under the Inside Agreement then in effect. Union agreed with Fischbach and dismissed the grievance. Moore sued Union and Fischbach on February 9, 1987. Fischbach filed a motion for summary judgment which the trial court granted on the basis that Moore received the rate of pay to which he was entitled under the contract.

In October of 1988, Moore wrote a letter to Union complaining that Fischbach had improperly transferred

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[2] The following is a partial list of appeals to the Ninth Circuit by Moore: 85-6320, 87-6066, 90-55557, 90-55558, 90-55559, 91-55411, 92-55515, 92-55517, 93-55287, 93-55381, 93-56717, 94-55120 and 94-55876. Moore has sued the attorneys and judges involved, and has filed multiple suits on the same grounds as cases he lost. Moore has filed new lawsuits naming attorneys representing Petitioner, as well as the District Court judge who handled this case below. *See Lawrence Moore v. Rudi M. Brewster; Kathy Lowe; Don Hendrix; Lewis Levy; Levy, Goldman & Levy, Inc.; Steven Sayler; Hillyer & Irwin, Inc.*, District Court Case No. 94-0002-R(BTM).

employees to Corbin-Dykes, a wholly-owned subsidiary of Fischbach in violation of the Inside Agreement. Union filed a formal grievance against Fischbach, and the dispute was heard by the Labor Management Committee ("LMC"). The LMC is comprised of three union representatives and three management representatives. After presentation of the dispute, the LMC deadlocked, with the three union representatives voting against Fischbach. Both Union and Fischbach decided to submit the matter to the Council on Industrial Relations ("CIR"). Pursuant to the Inside Agreement, the decision of the CIR was binding.

The CIR voted unanimously that Fischbach had *not* breached the Inside Agreement. This decision was independently made by twelve people consisting of both union and management representatives. In spite of the final, binding decision, Moore persisted in pursuing an action in the District Court against Fischbach.

Prior to beginning stage one of the bifurcated trial, the District Court correctly decided that before the jury could decide the issue as to whether the transfers between Fischbach and Corbin-Dykes were in violation of the Inside Agreement, the jury first had to determine whether or not Union had breached its duty of fair representation. As long as there had not been a breach of the duty of fair representation by Union, it was not for the jury to second guess the decisions of an independent body that had been properly delegated that responsibility.

The jury found that Union had not breached its duty of fair representation. The District Court signed a

judgment whereby Moore took nothing and Fischbach was to recover its costs from Moore. Moore subsequently filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. Fischbach opposed Moore's motion as it related to the jury verdict on the issue of whether Union breached its duty of fair representation in pursuing a grievance before the LMC and the CIR. The District Court denied Moore's motion for judgment notwithstanding the verdict. Moore then filed an ex parte motion to reopen discovery, which motion the Court denied.

Thereafter, Fischbach filed a motion with the District Court to determine its right to attorney fees and for a determination of their reasonableness. Subsequently, the District Court directed the parties back to the LMC for a determination of the reasonableness of Fischbach's fees. After the LMC concluded that fees in the amount of $224,140.01 were reasonable, Fischbach sought confirmation of the LMC's attorney fee award before the District Court. On June 9, 1993, the District Court confirmed the award and entered judgment on behalf of Fischbach against Moore.

Moore filed a motion to alter or amend the attorney fee award on July 6, 1993, and on October 19, 1993, the District Court denied Moore's motion. Moore filed a notice of appeal on November 8, 1993 in respect to the District Court's denial of his motion to alter or amend Fischbach's attorney fee award.

Upon appeal to the Ninth Circuit, Moore asserted that the fee-shifting provision of the collective bargaining agreement violated the LMRDA bill of rights. The Court

of Appeals agreed on the basis that the potential for such an award would have a "chilling effect" on union members' right to bring suit. (App. 1-13). Fischbach believes the Ninth Circuit failed to consider countervailing public policy interests, improperly interpreted 29 U.S.C. Section 411(a)(4), and is in conflict with other Circuit Courts of Appeal on this issue.

REASONS FOR GRANTING THE WRIT

It is respectfully contended that the United States Court of Appeals for the Ninth Circuit has decided federal questions in a way that clashes with public policy, presents an inter-circuit conflict, and improperly interprets a federal statute.

Public Policy Issues

The Ninth Circuit has raised a public policy issue concerning a "chilling effect" on the rights of union members to sue. There are, however, competing public policy interests. A union member should not be able to disregard the finality doctrine and res judicata whenever a final and binding grievance/arbitration hearing, conducted in good faith, is adverse to said member, allowing said member to re-litigate the same issue in court.

Union instituted arbitration against Fischbach under the authority of the parties' collective bargaining agreement. Union claimed that the transfer of electricians between Fischbach and its wholly owned subsidiary, Corbin-Dykes, in the absence of Fischbach clearing such

transfers through Local 569's hiring hall, was in violation of the parties' Inside Agreement.

A hearing on Union's grievance was held before the LMC on September 13, 1990. Eventually, the matter was referred by joint agreement of the union members and the management members to the CIR for the Electrical Contracting Industry in Washington, D.C., for a decision which would be *final and binding* on the parties. In view of the fact that Moore, as a member of Union, was represented by Union in this dispute, Moore was also bound by the decision of the CIR. As discussed, the CIR voted unanimously in favor of Fischbach and against Moore.

The doctrine of res judicata prohibits any court from re-litigating Moore's claims against Fischbach for an alleged breach of the Inside Agreement. *See Miller Brewing Co. v. Ft. Worth Distributing Co.*, 781 F.2d 494, 498-499 (5th Cir. 1986). This Court, in the "Steel Worker's Trilogy"[3], thoroughly discussed the role of the district courts vis-a-vis arbitration of labor disputes under collective bargaining agreements. Under the legislative scheme of the LMRA, 29 U.S.C. Section 173(d), grievance disputes are to be settled by the method set out in the collective bargaining agreement. The judiciary is preempted from determining the merits of a grievance, as that would usurp the function which Congress has entrusted to the arbitration tribunal.

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[3] *United Steelworkers v. American Manufacturing Company*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Company*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel and Car Corporation*, 363 U.S. 593 (1960).

This Court, in analyzing this issue, concluded the subject policy "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960). It is for the arbitrator, not the court, to interpret the terms of a collective bargaining agreement. *Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 v. Interstate Distributor Co.*, 832 F.2d 507, 510 (9th Cir. 1987); *see also, Hospital & Health Care Workers, Local 250, etc. v. Children's Hospital of San Francisco*, 694 F.Supp. 730, 733 (N.D. Cal. 1988).

Even upon the arbitration process reaching a final determination, the courts may not review the merits of the controversy. In support of the rule stated above, this Court has indicated:

> This plenary review by the court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. This underlines the fundamental error which we have alluded to in *United Steelworkers of America v. American Mfg. Co.*, (citation omitted) decided this day. As we therein emphasized, *the question of interpretation of the collective bargaining agreement is a question for the arbitrator.* It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593, 599 (1960) (emphasis added).

The policy of forestalling judicial interference in internal union affairs is applied in cases involving the interpretation and application of internal documents such as the collective bargaining agreement at issue herein. *See Clayton v. International Union, United Auto., etc.*, 451 U.S. 679, 687-688 (1981). Joint panel awards are entitled to the same deference as those entered by independent arbitrators. *Sheet Metal Workers International Asso. Local Union No. 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742, 744 (9th Cir. 1985).

Moore contended that the CIR's decision was not binding upon him if he could prove that the Union breached its duty of fair representation. The jury heard all of the evidence, and specifically concluded that Union had not breached its duty of fair representation.

Despite a final decision on Moore's grievances, Moore continued to litigate the same issues in violation of the collective bargaining agreement. As the District Court indicated:

> Section 1.06 (A-2) of the Inside Agreement provides that 'these provisions shall be the sole and exclusive remedy for any claims or alleged violation of any Section of this Agreement or any grievances arising pursuant to any of the provisions of this Agreement.' The same section continues: 'The final decision of the grievance resolution bodies [the Committee and the Council] shall be final and binding upon all parties hereto, including the employees employed by employers, pursuant to the provisions of this Agreement.'
>
> . . .

> As recognized by § 203(d) of the Labor Management Relations Act ("LMRA") and the Supreme Court, arbitration provisions in collective bargaining agreements generally are final and district courts do not have the power to review the merits of arbitration rulings. *See United Steelworkers v. American Manufacturing Company*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (*"Steelworkers Trilogy"*); *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 648 (1985) (reaffirming *Steelworkers Trilogy*).

Since Moore continued to pursue litigation in bad faith, Fischbach sought attorney fees under the collective bargaining agreement. As quoted in the Ninth Circuit's Opinion, the grievance section in the 1988 Inside Agreement provides, in relevant part:

> Should any party hereto or any employee employed subject to the provisions of this Section and Agreement, engage in or initiate any legal proceedings attacking, challenging or seeking to set aside either as a whole or in part the final decision of an arbitration, appeals or appellate body established pursuant to this Agreement, or who causes any action to be brought before any court or administrative body in contravention of this Section, who is unsuccessful in such endeavor, shall pay the reasonable costs and attorneys fees of the party prevailing in such action or litigation.

(App. 5).

The issue raised by the decision is whether the attorney fee provision violates Moore's right to institute an action in court, which right is guaranteed him under 29 U.S.C. Section 411(a)(4). In deciding the issue as it did, the Ninth Circuit did not consider the countervailing policy which supports the finality of binding arbitration decisions or the policy against vexatious and bad-faith litigation which pervades the matter at hand. These two countervailing policies must be considered in analyzing the right-to-sue doctrine advanced by Moore. The jury found for Union on the representation issue. Thus, until the attorney fee issue arose, there was no question that Fischbach had acted properly.

The key issue, therefore, is whether Union and NECA had the right and the power to negotiate the attorney fee provision here involved. Such an attorney fee provision is enforceable by an employer against the Union, or the Union against the employer. After it has been determined through binding arbitration that an employer has not breached the Inside Agreement, if a disgruntled Union member takes it upon himself to pursue frivolous and vexatious litigation against the employer, he should be bound by the same rules (and possibly sanctions) which would apply to the Union itself had the Union attempted to set aside a final and binding arbitration decision.

In *Hall v. Cole*, 412 U.S. 1 (1973) this Court affirmed an award of attorney fees, finding that Congress had not circumscribed fee shifting under the LMRDA. *Id.* at 8. This Court has also held that an award of attorney fees is allowable when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *F.D. Rich*

Co., Inc. v. United States, 417 U.S. 116 (1974); *see also, Alyeska Pipeline Service Company v. The Wilderness Society, et al.*, 421 U.S. 420 (1975).

In *Alyeska* this Court upheld an award of attorney fees against an employer indicating that under the American Rule, absent a statute *or enforceable contract*, a prevailing litigant is ordinarily not entitled to collect attorney fees from the loser. *Id.* at 247. While that case dealt with the "private attorney general" exception to the American Rule, it is important because it sets forth a contractual exception as well.

Specifically discussing suits by union members under the LMRDA, the Fifth Circuit indicated in *McDonald v. Oliver*, 525 F.2d 1217 (5th Cir. 1976), *cert. denied*, 429 U.S. 817 (1976), that if the individual has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons" an attorney fee award against that individual is appropriate. *McDonald* at 1228, citing *Alyeska Pipeline Service Co. v. Wilderness Society*, 412 U.S. 240 (1975).

This protection is not one-sided. If Moore had prevailed, and thereby conferred an ostensible benefit on other members of Union, he would have had an opportunity (regardless of the existence of a fee-shifting provision in the Inside Agreement) to obtain attorney fees. Also, under California law (Civil Code Section 1717) any fee-shifting provision is automatically reciprocal.

In *Aguinaga v. Food Workers*, 993 F.2d 1480 (10th Cir. 1993) the court set forth examples of exceptions to the American Rule:

> Under the American Rule, absent a statute or *enforceable contract*, a prevailing litigant is ordinarily not entitled to collect reasonable attorney fees from the loser. [Citation] . . . [However], courts have recognized a small number of equitable exceptions to the American Rule – i.e., *the bad faith exception*, the common fund exception, the willful disobedience of a court order exception, and the common benefit exception. [Citation].

Aguinaga at 1481-82 (emphasis added).

In the case at bar, there is contractual authority allowing the court to invoke its power to award attorney fees against a litigant who has acted in bad faith. While this appears clear from the record of seemingly endless appeals, any question of fact as to Moore's bad faith should be remanded to the district court. Furthermore, regardless of Moore's bad faith, public policy supports the finality of binding arbitration, and an attorney fee-shifting provision is an appropriate mechanism to discourage frivolous litigation. Additionally, since the fee-shifting provision is reciprocal, it is in essence a neutral provision. Even if the provision has some chilling effect, it does not automatically follow that a union member's right to sue has been limited.

The Court in *R.R. Burroughs v. Operating Engineers Local Union No. 3*, 417 F.2d 370 at 373 (9th Cir. 1969) recognized the concept of litigation harassment which is

not legal nor equitable and, therefore, is not to be condoned:

> [W]e do not condone the use of lawsuits for harassment purposes and do not suggest that a union would not have all of the rights which the law gives to those who are harassed. [¶] Authorities to show that equity will interfere to restrain irreparable mischief, or to suppress oppressive and interminable litigation, or to prevent multiplicity of suits, is unnecessary, as that proposition is universally admitted. [Citation].

The dissent in *Burroughs*, dealt with an analogous issue in the application of the doctrine of unclean hands and whether that would have a "chilling effect" on litigants. In that context, chilling vexatious litigation should be allowed. Otherwise there is almost complete immunity for union members who harass their unions and disrupt union affairs with vexatious lawsuits:

> The majority is concerned that to allow the defense of unclean hands in this action would have the ultimate effect of 'chilling' the exercise of the member's right to sue by forcing the potential plaintiff to make a gambling decision based on the probability of whether it will later be determined that he acted in good faith. I am not much disturbed by this possibility, however, since the potential plaintiff could be assured that a finding of good faith would necessarily follow a determination that he had a reasonable basis for belief in his chances of legal victory.

Burroughs at pp. 374-376 (citation omitted).

As stated earlier, Moore had no probable cause or reasonable justification to file his suits against Fischbach

after the final binding arbitration decision. The suits were vexatious and in bad faith. At the very least, this matter should be remanded for evidentiary findings on this issue. The Ninth Circuit has denied Fischbach this opportunity, deciding that the fee-shifting provision can *never* be applied to a union member. Such a holding is overbroad.

The National Labor Relations Act, 29 U.S.C. § 158, does not authorize the courts to make collective bargaining contracts or to prescribe what shall be written into them, and courts may not interfere in negotiations between the employer and employees as long as those negotiations are carried on in *good faith. NLRB v. Corsicana Cotton Mills,* 179 F.2d 234 (5th Cir. 1950).

Non-mandatory subjects of collective bargaining may be lawfully included in collective bargaining contracts if the parties agree to them. *Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO v. NLRB,* 320 F.2d 615 (C.A.Pa. 1963), *cert. denied,* 375 U.S. 984, 11 L.Ed. 472 (1963). Collective bargaining implicates resolution of *new problems* not covered by existing agreements. *J.I. Case Co. v. NLRB,* 253 F.2d 149 (7th Cir. 1958). In the case at bar, the parties to the subject collective bargaining agreement attempted to deal with a "new problem" that had arisen after the 1986 Inside Agreement was signed. That problem was incessant bad-faith litigation. Rather than attempt to prevent any party from bringing suit, which could have a "chilling effect" on parties' rights, NECA and Union negotiated an attorney fee provision to give reviewing courts contractual authority to use their powers to award attorney fees to a prevailing party in appropriate circumstances.

It would seem appropriate to allow for arms' length, good faith bargaining to achieve an agreement which imposes some risk on vexatious litigants. That is not to say that such litigants should be prevented from filing suit in the first place, but it is to say that *some* parameters should be enforced. The solution proposed by the parties to the subject collective bargaining agreement is to say we cannot stop anyone from litigating, but if a person litigates in a harassing manner, that person had best prevail, or that person will have to pay the other party's reasonable attorney fees. Such a provision is standard fare in most commercial situations. It should be allowed in a collective bargaining agreement negotiated in good faith.

Moore's legal actions against anyone and everyone who dares to oppose him are legendary. His appeals are endless. It is not Moore's rights which are being worn down, but the resources of the judiciary, the resources of Fischbach, and the resources of many good offices which have tried to deal with Moore. Fischbach has thus far been forced to incur hundreds of thousands of dollars in attorney fees to defend itself against Moore's baseless allegations. Fischbach has been forced to respond to countless motions which have been filed by Moore. Rule 11 sanctions have been totally ineffective in curbing Moore's propensity to file frivolous motions, pleadings and appeals.

Unless this Court recognizes the right to chill the *abuse* of Moore's 29 U.S.C. Section 411(a)(4) rights, such abuse will continue. A "chill" must be chosen. If an attorney fee provision protecting all parties, including Union members, from bad-faith vexatious litigation cannot be enforced, there will be no finality to binding

arbitration and continuous bad-faith litigation will be acceptable. Moore had the right to complain and grieve to Union and to the Labor Management Committee. He was bound to do so. Presumably he did so in good faith. But where the actions of Union and Fischbach are thoroughly vindicated by the grievance procedure and arbitration, there must be some way to avoid endless litigation. Forcing the losing party who acts in bad faith to pay the prevailing party's attorney fees is an equitable way to spread the risk.

Interpretation Of Section 411(a)(4)

The attorney fee provision in Section 1.06 of the Inside Agreement does not restrict or impair an employee's protective remedies, including that employee's right to sue. The Ninth Circuit has decided that Section 1.06 improperly restricts union members' right to sue. However, collecting fees under the fee provision in the collective bargaining agreement is not a violation of a union member's right to sue under 29 U.S.C. Section 411(a)(4). Moore cited numerous cases for the proposition that unions may not limit their members' right to sue – a proposition which is wholly irrelevant to this case. This case involves an employer, not a union. It is not appropriate to equate an employer as a party who is on the same side as a union. They are essentially adverse parties.

In *Pawlak v. Greenawalt*, 477 F.Supp. 149 (M.D. Pa. 1979) affirmed 628 F.2d 826 (3rd Cir., 1980), *cert. denied*, 449 U.S. 1083 (1980) and each of the cases cited by Moore for this proposition, the fee clause was found in the

Union's Constitution and not in the collective bargaining agreement. Furthermore, the court prohibited a *union* rather than an *employer* from limiting the rights of its members to sue. None of the cases extend 29 U.S.C. Section 411(a)(4) to the conduct of an employer.

Section 411(a)(4) is a bill of rights for members of labor organizations under Title I of the LMRDA. This bill of rights was never intended to be applied outside the union-member relationship. *Thompson v. New York C. R. Co.*, 361 F.2d 137 (2d Cir. 1966); *see generally, Tomko v. Hilbert*, 288 F.2d 625 (3rd Cir., 1961) (a comprehensive review of the legislative intent that the act only affects the union-member relationship). Because the LMRDA governs only the union-member relationship, it is not properly invoked against Fischbach, an employer.

The courts have refused to apply Section 411(a)(4) to employers even where collusion with employers is alleged. *See Duncan v. Peninsula Shipbuilders Association*, 394 F.2d 237, 240 (4th Cir. 1968).

Relying on both *Thompson* and *Duncan*, the Second Circuit, in *Abrams v. Carrier Corporation*, 434 F.2d 1234 (2d Cir. 1971), *cert. denied*, 401 U.S. 1009 (1971), disallowed jurisdiction over an employer, stating that the union alone could be held under LMRDA and the jurisdictional defect could not be circumvented by a conspiracy allegation.

Despite other Circuits' refusal to apply Section 411(a)(4) to employers, even in cases of alleged collusion or conspiracy, the Ninth Circuit held, without reference to any case authority, that "Section 411(a)(4) is not limited to lawsuits between unions and their members." (App. 9).

Alleged collusion between an employer and a union does not allow a union member to invoke Section 411(a)(4) against an employer. Cases in which the court has granted fees based on a provision in the collective bargaining agreement are much more applicable to the facts at hand. For example, in *Kemner v. District Council of Painting & Allied Trades No. 36*, 768 F.2d 1115 (9th Cir. 1985), an employer was entitled to reasonable attorney fees and costs upon proper application where, as here, the collective bargaining agreement provided for enforcement of arbitration awards with post-award attorney fees.

Similarly, in *Burke v. French Equipment Rental, Inc.*, 687 F.2d 307 (9th Cir. 1982) the Ninth Circuit stated that if a collective bargaining agreement had contained a provision for attorney fees, the employer would have had a claim for those fees. *Burke* at 312. Neither *Kemner* nor *Burke* mention the purported restriction of Section 411(a)(4) because that section is inapplicable to employer fee provision requests like those in *Kemner*, *Burke* and the instant case.

For the reasons stated above, the District Court (after revisiting this issue on two separate occasions), held that Section 411(a)(4) does not relate to the instant situation. The "chilling effect" that concerns the Ninth Circuit does not apply in cases like this.

Moore has continuously requested, demanded and litigated his entitlement to all of the benefits which are provided to Union members under the Inside Agreement. Conversely, Moore asks to be sheltered from any of the detriments that may also be associated with the Inside Agreement, even where such detriment arises as a result

of his bad-faith, vexatious litigation. Moore should be subject to such detriment. Furthermore, in order to support the legislative policy in favor of the finality of binding arbitration, the subject fee-shifting provision becomes a valuable tool to advance this important public policy.

CONCLUSION

For all the reasons stated, Petitioner Fischbach & Moore, Inc., prays that this Court grant a Writ of Certiorari to review the decisions of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

NORMAN R. ALLENBY
Counsel for Petitioner

Lawrence MOORE, Plaintiff-Appellant,
and
Walter F. Whelan; Walter F. Woblan, Jr.,
Plaintiffs,

v.

LOCAL 569 OF the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; Paul Blackwood; Wayne Lovin; Jim Westfall; Tom Pridemore; Joe Heisler; Dick Smith; Terry Godshalk, et al.; International Brotherhood of Electrical Workers; J.J. Barry; S.R. McCann; Richard Robbins; San Diego Electrical Industry Training Trust,
Defendants,

and

Atkinson Mechanical; Fischbach & Moore, Inc.,
Defendants-Appellees.

No. 93-56717.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 5, 1995.

Decided May 5, 1995.

Union member brought action against employer and local union alleging a violation of collective bargaining agreement and duty of fair representation. After employer prevailed, employer moved for award of attorney fees under collective bargaining agreement which required employee to pay attorney fees to prevailing party when employee is unsuccessful in any proceeding brought to set aside, in whole or in part, an arbitration decision. After upholding agreement, District Court referred issue to arbitration for determination as to reasonableness of attorney fees. The United States District

Court for the Southern District of California, Rudi M. Brewster, J., upheld award of $244,104.01 as attorney fees. Union member appealed. The Court of Appeals, Fernandez, Circuit Judge, held that: (1) fee-shifting provision violated Labor-Management Reporting and Disclosure Act (LMRDA) bill of rights, and (2) district court did not abuse its discretion in finding that union member's motion to amend complaint after entry of judgment was frivolous; however, case would be remanded for district court to exercise its discretion under amended version of Rule 11.

Reversed in part, vacated in part and remanded.

Lawrence Moore, San Diego, CA, in pro. per.

Steven C. Sayler, Norman Allenby (argued), Hillyer & Irwin, San Diego, CA, for defendants-appellees.

Lewis Levy, Levy, Goldman & Levy, Los Angeles, CA, for Internat'l Brotherhood Elec. Workers Local 569.

Appeal from the United States District Court for the Southern District of California.

Before: McKAY,* REINHARDT, and FERNANDEZ, Circuit Judges.

FERNANDEZ, Circuit Judge:

Lawrence Moore brought this action against Fischbach & Moore, Inc. (Fischbach) among others. After his action failed as to Fischbach, the district court upheld

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* Hon. Monroe G. McKay, Senior United States Circuit Judge, United States Court of Appeals for the Tenth Circuit, sitting by designation.

an attorneys' fee award which was imposed upon Moore pursuant to an arbitration procedure. Moore then appealed. He raises a whole host of issues, but we find one dispositive – did the arbitration agreement's attorneys' fee provision apply to Moore? The answer to that question is no. We, therefore, do not decide the other issues regarding that award of fees. However, we do consider Moore's additional claim that he should not have been sanctioned for a late filed motion. We reverse in part and vacate and remand in part.

BACKGROUND

Moore was a member of Local 569 of the International Brotherhood of Electrical Workers and an employee of Fischbach. It and Local 569 were signatories to a collective bargaining agreement which had a lengthy title but which we will simply call the "Inside Agreement." At the time this dispute arose the October 1, 1986 version of the Inside Agreement was in effect, but before the case went to trial, the August 23, 1988 version was adopted.

Moore was of the opinion that Fischbach and Local 569 had cooperated in a manner that allowed Fischbach to evade the terms of the 1986 version of the Inside Agreement. He therefore brought this action. Local 569 then filed a formal grievance against Fischbach based upon the substance of Moore's complaints. That process was initiated after the 1988 version of the Inside Agreement was in effect, and reached a conclusion while this action was in progress. Fischbach prevailed.

Moore, however, continued with this action because he still believed that Fischbach had violated the Inside

Agreement and because he also believed that Local 569 had violated its duty of fair representation to him. Fischbach again prevailed.

After winning, Fischbach made a motion for an award of the attorneys' fees under the 1988 version of the Inside Agreement. Upon holding that the agreement was legal and applicable to Moore, the district court referred the issue to arbitration for a determination as to the reasonableness of the amount. Our review of the record reveals that the arbitration committee considered only the reasonableness of the fees. The arbitration resulted in an award of $244,104.01 of attorneys' fees against Moore. Upon petition by Fischbach, the district court confirmed the award and entered judgment accordingly. Moore appealed.

STANDARD OF REVIEW

The scope of an arbitration clause is reviewed de novo. See Dennis L. Christensen Gen. Bldg. Contractor, Inc. v. General Bldg. Contractor, Inc., 952 F.2d 1073, 1076 (9th Cir.1991). Of course, we must determine whether the arbitration provision itself is legal. See Graham Oil Co. v. ARCO Prods. Co., 43 F.3d 1244, 1247-48 (9th Cir.1994). We review that issue de novo also. See Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc., 925 F.2d 1136, 1139 (9th Cir.1991); Paulson v. Dean Witter Reynolds, Inc., 905 F.2d 1251, 1254 (9th Cir.1990). We review a district court's imposition of sanctions pursuant to Federal Rule of Civil Procedure 11 for abuse of discretion. See Roundtree v. United States, 40 F.3d 1036, 1038 (9th Cir.1994).

DISCUSSION

A. Legality of the Fee Shifting Provision.

Long after the dispute over Fischbach's practices arose between it and Moore, and after Moore had commenced this litigation, the 1988 version of the Inside Agreement was adopted. The following provisions were made a part of that agreement:

> Should any party hereto or any employee employed subject to the provisions of this Section and Agreement, engage in or initiate any legal proceedings attacking, challenging or seeking to set aside either as a whole or in part the final decision of an arbitration, appeals or appellate body established pursuant to this Agreement, or who cause any action to be brought before any court or administrative body in contravention of this Section, who is unsuccessful in such endeavor, shall pay the reasonable costs and attorney fees of the party prevailing in such action or litigation. The amount of the costs and attorneys fees to be paid by the person engaging in legal or administrative proceedings seeking to set aside the decision of a dispute resolution body as set forth hereinabove, or otherwise litigating any of the provisions of this Agreement, shall be determined by the Labor-Management, CIR or Appeals Committee established under the provisions of this Agreement, whichever is applicable.

Inside Agreement, 1988 version, § 1.06A-2 (emphasis added).

After holding that the fee-shifting provision was legal and applicable to Moore, the district court referred Moore's case to the Appeals Committee for a determination as to the amount of fees to be awarded. The Committee awarded $224,140.01 in fees, and the district court ultimately confirmed that award. Moore asserts that the district court erred when it decided that the provision could legally be applied to him. We agree.

The fee provision violates the rights guaranteed to members of labor organizations by 29 U.S.C. § 411(a)(4), which provides:

> No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding. . . .

That employee bill of rights protection is worded in the most inclusive terms, which are clearly intended to preclude restraints upon members' rights to seek relief from courts and agencies.

We have not been receptive to attempts to restrict the reach of § 411(a)(4). For example, when a union argued for various restrictive interpretations we said:

> Section 411(a)(4) speaks of – "an action in any court." The word "action" is in no way limited and there is nothing in the Act which distinguishes between suits involving member as opposed to employee rights, between suits involving internal as opposed to external union

> problems, or between suits brought in good faith as opposed to those brought in bad faith.

Operating Eng'rs Local Union No. 3 v. Burroughs, 417 F.2d 370, 373 (9th Cir.1969), cert. denied, 397 U.S. 916, 90 S.Ct. 921, 25 L.Ed.2d 97 (1970). We went on to declare that the right to sue would be less than fully protected if a member had to predict how some "union official or judge" would view his action. Id. The effect in the particular case was not great (a suspended fine), but we still refused to countenance it. We would not "read any limitations into § 411(a)(4)." Id. at 374.

Similarly, in Ross v. International Bhd. of Elec. Workers, 544 F.2d 1022 (9th Cir.1976), we refused to limit § 411(a)(4) where a union member sued over an election dispute. We were not at all impressed with arguments that he was a union officer, that his was an election dispute, and that his court actions had been dismissed. Id. at 1023-25. Nor were we convinced by the argument that the relatively small amounts awarded against him (and partially suspended) could be called assessments, rather than fines. As we said, "since the levy, no matter how labeled, serves to 'limit the right' of a member to sue, we find the distinction to be without significance." Id. at 1025.

We were no more persuaded that § 411(a)(4) should not be applied where a union, which was sued by its members, sought to retaliate by filing an allegedly specious lawsuit against them. In Phillips v. International Ass'n of Bridge Workers, Local 118, 556 F.2d 939, 942 (9th Cir.1977), we said:

> If a union member's right to sue is to have any meaning, courts must be ever vigilant in protecting that right against indirect and subtle devices as well as against direct and obvious limitations.
>
> Since we must here accept as true the allegations of the complaint, we accept as fact that the union actions were malicious, without jurisdiction or merit, and were brought to serve as reprimands and as examples to other union members, and to render it financially difficult for appellants to continue to prosecute their Nevada actions. In our judgment a claim under § 411(a)(4) was stated.

Id. In other words, we must be vigilant in assuring that union members' rights are not ground down and we would not do so were we to permit § 411(a)(4) to be watered down. But the attorneys' fee provision we deal with here has just that effect. If the union members in Burroughs and Ross risked imposition of some relatively small assessments, union members under this collective bargaining agreement would have to risk enormous fee awards. Moore has been told that he must pay more than $200,000 for his temerity.

Fischbach, however, argues that § 411(a)(4) is basically concerned with the relationship of members with their unions. We have, indeed, said that the Labor-Management Reporting and Disclosure Act, of which § 411(a)(4) is a part, "protects only basic union membership rights." Building Material & Dump Truck Drivers, Local 420 v. Traweek, 867 F.2d 500, 510 (9th Cir.1989). However, there we were concerned with whether trivial violations could be considered violations of § 411. Id. We

answered that question "no." That is not what we deal with here. The argument loses all of its puissance once one focuses on the statute itself and contemplates the effects of the provision at hand. Section 411(a)(4) is not limited to lawsuits between unions and their members. To the contrary, it strikes down limitations "irrespective of whether . . . the labor organization" or an officer is a named defendant. Clearly, Congress foresaw the possibility that a union would try to limit a member's right to sue someone else. A very likely someone else would be an employer who has a collective bargaining agreement with the union, in a word, an employer like Fischbach. After all, one of Congress' purposes in adopting the LMRDA was to insure that "labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations." 29 U.S.C. § 401(a) (emphasis added).

Furthermore, while the union has not sought to limit the employee's rights directly, it has surely done so indirectly. When it agreed to a fee provision that would serve to chill employees' rights to contest the results of grievance procedures in court, it undermined its members' ability to challenge the results of its own actions. It did that just as surely as it would have done if it had directly provided for the imposition of fines or assessments. At argument Local 569 essentially conceded that the union could not collect attorneys' fees from a member under the fee provision. We see no reason to allow the mulct to be channelled to the employer's hands instead. In either event, the employee will be restrained from attacking the

actions of the union and the employer. If a member-employee seeks to attack his employer's breach of a collective bargaining agreement, it cannot be gainsaid that he must also attack his union's representation of his interests. See Salinas v. Milne Truck Lines, Inc., 846 F.2d 568, 569-70 (9th Cir.1988). To restrain or limit him on one flank restrains or limits him on the other.

Nor can we accept the argument that the provision is no limitation at all. We are told that the employee can sue all he wants, he just had better be successful. If he is not, he must pay out a great sum of money. Interestingly enough, the contract provision is not reciprocal – should the employee win his point, he is not to be reimbursed for his attorneys' fees.

Despite suspicions that appellate judges do not understand the real world, we do understand that the threat of attorneys' fees can be a real deterrent to the assertion of rights. They can be thought of as a kind of penalty. See Summit Valley Indus., Inc. v. Local 112, United Bhd. of Carpenters, 456 U.S. 717, 724, 102 S.Ct. 2112, 2116, 72 L.Ed.2d 511 (1982). They can even become oppressive and " 'disproportionate to the magnitude and importance of the causes in which they are taxed. . . . ' " Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240, 252 n. 24, 95 S.Ct. 1612, 1619 n. 24, 44 L.Ed.2d 141 (1975) (citation omitted). Similarly, we have recognized that the possibility of being subjected to large fee awards if they lose does undercut plaintiffs' desire and ability to pursue their causes. See, e.g., Sanchez v. City of Santa Ana, 936 F.2d 1027, 1041 (9th Cir.1990), cert. denied, 502 U.S. 957, 112 S.Ct. 417, 116 L.Ed.2d 437 (1991); Miller v. Los Angeles County Bd. of Educ., 827 F.2d 617, 619 (9th

Cir.1987). All of this can even be true if the plaintiff is pretty, or very, sure that he is correct. It would take a hearty soul with an awfully important principle at stake to run the risk of, say, a $224,000 fee award. Putting up with a little injustice might be better. Perhaps Moore is that hearty soul, but he did start this litigation before the fee provision even came into existence. In any event, he need not be that pertinacious. He need not hurdle an attorneys' fee barrier.

B. Rule 11 Sanctions.

After Moore filed this appeal, he made a motion asking the district court to allow amendment of his complaint. The district court found that the motion was frivolous because judgment had already been entered and because the case was already on appeal, as a result of which it was deprived of jurisdiction. It therefore imposed sanctions of $512 upon Moore. See Fed.R.Civ.P. 11. We are unable to say that the district court abused its discretion when it reached that decision. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 402, 110 S.Ct. 2447, 2459, 110 L.Ed.2d 359 (1990); Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1366-67 (9th Cir.1990) (en banc).

However, when the district court issued its final sanction order – June 23, 1993 – the December 1, 1993 amendments to Rule 11 had not yet gone into effect. Before December 1 sanctions were mandatory, but from that day forward they became discretionary. A number of other changes were also made. The amendment is " 'applicable to all proceedings in civil cases thereafter

commenced and, insofar as just and practicable, all proceedings in civil cases then pending.' " Roundtree, 40 F.3d at 1040 (citation omitted). It is generally a sound approach to afford the district court " 'an opportunity to exercise its discretion whether to impose sanctions under the amended version.' " Id. (citation omitted). We will follow that approach here, which seems particularly appropriate in light of Moore's success in this appeal, which serves to vindicate his position in the district court, at least to some extent. Therefore, while we affirm the district court's decision that sanctions were appropriate, we vacate the award against Moore and remand to the district court so that it can exercise its discretion under the amended version of Rule 11 as to the imposition, nature, and amount of sanctions, if any.[1]

CONCLUSION

After Moore commenced this action, the arbitration provisions of the collective bargaining agreement were amended to impose attorneys' fee shifting upon any member who brought an action to set aside the arbitral results. However, we hold that neither Fischbach nor Local 569 could hide behind an attorneys' fee revetment when Moore sought to attack their actions. In other words, section 106 of the 1988 version of the Inside Agreement improperly restricts a union member's right to sue. Because the fee-shifting provision violates § 411 of the LMRDA, we reverse the district court's determination

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[1] Fischbach's request for attorneys' fees on appeal is denied because it has not prevailed.

that the provision could legally be applied to Moore and vacate the award.

We also vacate the award of Rule 11 sanctions and remand for reconsideration under the amended Rule 11 provisions.

REVERSED in part, VACATED in part and REMANDED.

Lawrence MOORE, Plaintiff-Appellant,

v.

LOCAL 569 OF the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; Paul Blackwood; Wayne Lovin; Jim Westfall; Tom Pridemore; Joe Heisler; Dick Smith; International Brotherhood of Electrical Workers, Defendants-Appellees.

No. 94-55120.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted April 5, 1995.

Decided May 8, 1995.

Appeal from the United States District Court, for the Southern District of California, D.C. No. CV-85-01719-B, Rudi M. Brewster, District Judge, Presiding.

S.D.Cal.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Before: McKAY,* REINHARDT, and FERNANDEZ, Circuit Judges.

MEMORANDUM**

Lawrence Moore appeals the district court's order which disbursed the proceeds of a supersedeas bond,

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* Hon. Monroe G. McKay, Senior United States Circuit Judge, United States Court of Appeals for the Tenth Circuit, sitting by designation.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

posted by Local 569 pursuant to a dispute under a collective bargaining agreement, to various creditors of Moore. We affirm in part and reverse in part.

Moore contends that the district court erred when it exercised jurisdiction over this case, when it permitted Moore's creditors to proceed against the bond, and when it permitted Local 569 an offset. Moore's ex-employer, Fischbach & Moore (Fischbach), which was allowed to proceed against the bond, requests attorney's fees.

A. District Court Jurisdiction

A court retains jurisdiction over matters necessary to satisfy a judgment. See Blackburn Truck Lines, Inc. v. Francis, 723 F.2d 730, 732 (9th Cir. 1984). In addition, the general rule is that when a proper notice of appeal has been timely filed, jurisdiction over any matters involved in the appeal is transferred from the district court to the court of appeals. See Matter of Thorp, 655 F.2d 997, 998 (9th Cir. 1981) (per curiam). The district court is divested of authority to proceed further except in aid of the appeal, or to correct clerical mistakes, or in aid of execution of a judgment, until the mandate has issued. Id; see also Lara v. Secretary of the Interior of the United States, 820 F.2d 1535, 1543 (9th Cir. 1987).

In the instant case the contested orders were made well after the issuance of the mandate. Moreover, the order regarding Local 569's entitlement to an offset was made pursuant to the district court's authority to tax costs, and the orders regarding Fischbach, George de la Flor and L & B Electric were made pursuant to Fischbach's writ of execution and the latter creditors'

filing of valid liens. The district court had jurisdiction to make those orders in this case.

B. The Merits

With one exception, the district court did not err when it awarded Moore's creditors amounts from the bond.

(1). In Moore v. Local 569, Int'l Bhd. of Elec. Workers, No. 93-56717 (9th Cir. 1995), filed on the same day as this disposition, we have reversed the district court's determination in Southern District of California District Court Case No. 87-0172B, which awarded Fischbach attorney's fees. That award was the basis of Fischbach's claim against the bond in this case. Thus, because that award has been reversed, that claim against the bond must fall with it.[1]

(2). George de la Flor had represented Moore in this action. They had entered into a contract which provided that de la Flor would have a lien on any award that Moore obtained in this matter. De la Flor filed a notice of attorney's lien in this action. We acknowledge the validity of attorney's liens in federal actions. See Venegas v. Skaggs, 867 F.2d 527, 531 (9th Cir. 1989), aff'd sub nom. Venegas v. Mitchell, 495 U.S. 82, 110 S. Ct. 1679, 109 L. Ed. 2d 74 (1990); see also United States v. 717.42 Acres of Land, 955 F.2d 376, 382 (5th Cir. 1992). We analyze fee contracts and the existence of attorney's liens under state law. Venegas, 867 F.2d at 531.

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[1] Fischbach seeks its attorney's fees in this appeal. Of course, it cannot recover them.

De la Flor's lien was valid. It was not extinguished, as Moore asserts, under California Code of Civil Procedure section 697.040(a) when Local 569 posted its bond since that provision refers to liens created under statute while the lien at issue here was created by contract. See Cetenko v. United Cal. Bank, 30 Cal. 3d 528, 531, 179 Cal. Rptr. 902, 904, 638 P.2d 1299 (1982). In addition, the lien was not invalidated by California Code of Civil Procedure sections 708.410-.420, which set forth requirements for notices of liens filed by judgment creditors, because de la Flor is not a judgment creditor. See id., 30 Cal. 3d at 533, 179 Cal. Rptr. at 905. California law also provides that an attorney's lien survives an attorney's discharge or voluntary withdrawal. See Fracasse v. Brent, 6 Cal. 3d 784, 791, 100 Cal. Rptr. 385, 390, 494 P.2d 9 (1972) (discharge); Estate of Falco, 188 Cal. App. 3d 1004, 1016, 233 Cal. Rptr. 807, 814 (1987) (withdrawal); Pearlmutter v. Alexander, 97 Cal. App. 3d Supp. 16, 19-20, 158 Cal. Rptr. 762, 763-65 (Cal. App. Dep't Super. Ct. 1979) (withdrawal). The district court determined that services were rendered and that the contract explicitly provides for a lien on Moore's judgment. Therefore, the district court did not err when it allowed de la Flor's claim.

(3). L & B had been awarded damages and costs against Moore in a different case, and L & B had a valid lien. Moore's citation to provisions of the California Code of Civil Procedure does not change this. Section 708.410 requires a judgment creditor to file a notice of lien and a certified copy of its judgment in order to obtain a lien. The record reflects that L & B did those things. Section 697.040(a) extinguishes liens where a bond is posted and a stay of judgment is obtained. However, that rule applies

only to stays that occur in the case where the creditor recovered the judgment. See California Commerce Bank v. Superior Court, 8 Cal. App. 4th 582, 583, 10 Cal. Rptr. 2d 418, 419 (1992). Therefore, the district court properly allowed L & B's claim.

(4). Moore challenges the district court's decision to allow Local 569 an offset. Local 569 provided evidence that service of the bill of costs was made on Moore in a timely fashion and that he was notified of the date of the hearing on the bill. The costs were warranted under Federal Rule of Appellate Procedure 39, which provides that the cost of the reporter's transcript will be taxed against the appellant if a judgment is affirmed. Moore lost his appeal number 90-55557. Consequently, Local 569 was a prevailing party in that case. The district court did not abuse its discretion when it held Moore responsible for eighty percent of the transcript costs and allowed Local 569 the offset. The practice of apportioning costs is not a new one. Cf. Cornwell Quality Tools Co. v. CTS Co., 446 F.2d 825, 833 (9th Cir. 1971), cert. denied, 404 U.S. 1049, 92 S. Ct. 716, 30 L. Ed. 2d 740 (1972). California courts also recognize the validity of offset. See Kruger v. Wells Fargo Bank, 11 Cal. 3d 352, 362, 113 Cal. Rptr. 449, 455, 521 P.2d 441 (1974). Finally, the district court's decision to allow Local 569 an offset did not conflict with the local rules. Local Rule 54.1(c) of the Southern District of California specifically provides that "[t]he cost of transcripts necessarily obtained for appeal is allowable." That comports with Federal Rule of Appellate Procedure 39(e), which directs district courts to tax the costs of the reporter's transcript. Thus, the allowance of the offset was proper.

AFFIRMED in part, REVERSED in part and REMANDED. Between Moore and Fischbach, Moore shall recover his costs on appeal. The other appellees shall recover their costs on appeal from Moore.

Lawrence MOORE, Plaintiff-Appellant,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 569; Tom Pridemore; Jim Aylsworth; International Brotherhood of Electrical Workers, JJ Barry; Neca; Ron Cooper; Dave Raspolich; James Fuller; Fischbach & Moore, Inc., Defendants-Appellees.

No. 94-55876.

United States Court of Appeals, Ninth Circuit.

Submitted April 5, 1995.*

Decided May 8, 1995.

Appeal from the United States District Court, for the Southern District of California, D.C. No. CV-93-01857; Judith N. Keep, Chief Judge, Presiding.

S.D.Cal.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Before: McKAY,** REINHARDT, and FERNANDEZ, Circuit Judges.

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* The panel unanimously finds this case suitable for decision without oral argument. Fed.R.App.P. 34(a); 9th Cir.R. 34-4.

** Hon. Monroe G. McKay, Senior United States Circuit Judge, United States Court of Appeals for the Tenth Circuit, sitting by designation.

MEMORANDUM***

Lawrence Moore appeals the district court's dismissal of his action which alleged that his union, Local 569 of the International Brotherhood of Electrical Workers, and his old employer, Fischbach & Moore, Inc., wrongfully limited his right to sue in violation of the Labor Management Reporting and Disclosure Act, 9 U.S.C. § 411(a)(4), had breached their contract in violation of the Labor Management Relations Act, 29 U.S.C. § 185, and were additionally liable for conspiracy, fraud, and intentional infliction of emotional distress. We affirm in part and reverse in part.

A. The low number transfer of this case

Pursuant to the Southern District of California's Local Rule 40.1(e), this case was low numbered to the judge who presided over a previous action filed by Moore against his union and employer for breach of a collective bargaining agreement and violations of the LMRDA and LMRA. That rule is designed to conserve judicial resources and it was appropriately implemented in the instant case. It does not confer upon litigants the right to appear before a particular judge. See Guam Sasaki Corp. v. Diana's Inc., 881 F.2d 713, 715 (9th Cir.1989) (this court accords deference to district courts' "local rules and . . . district court decisions which are designed to delineate local practice and define the local rules").

*** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

B. The motion for recusal

When the judge who was assigned this case through the low-number process recused himself because he had been sued by Moore in a separate action, the case was randomly assigned to Chief Judge Judith N. Keep. Moore contends that Judge Keep erroneously denied his motion for her recusal on the ground that she had entertained a previous case that he had filed against his union. In that case Judge Keep had noted that Moore's lawsuits were becoming a "hassle" and a "pain" to Moore's opponents. She also recognized their frustration.

Judge Keep's observations do not give rise to a valid claim for recusal since they do not reveal a high degree of favoritism or antagonism. See Liteky v. United States, ___ U.S. ___, 114 S.Ct. 1147, 1157, 127 L.Ed.2d (1994). At most, they are merely expressions of impatience or dissatisfaction. That does not constitute a reason for recusal. Id.

C. J.J. Barry's dismissal

The district court dismissed J.J. Barry for lack of personal jurisdiction. Moore's claim on appeal is that he never intended to sue Barry in his personal capacity, and that the district court's dismissal shows her bias against Moore. The claim is meritless.

Barry submitted a declaration which established the facts necessary to determine that he did not have minimal contacts with California. See Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1484-1490 (9th Cir.1993). Consequently, the district court did not err when it dismissed the case against him for lack of personal jurisdiction. Id.

The district court's ruling did not lend itself to a claim of judicial bias. A judicial ruling alone will rarely give rise to a valid claim for recusal. Liteky, ___ U.S. at ___, 114 S.Ct. at 1157. Furthermore, Judge Keep made absolutely no statement in her ruling regarding the dismissal of Barry which showed any form of favoritism or antagonism toward Moore.

D. The dismissal on res judicata grounds

In Southern District of California District Court Case No. CV87-0172B, the parties had litigated the question of whether Moore was obligated to pay attorney's fees pursuant to a provision in the collective bargaining agreement. In that case, the district court determined that Moore was obligated to pay fees under the fee provision. The district court dismissed this action on res judicata grounds because Moore's claim here and the claim in case number 87-0172B centered on the same provision of the collective bargaining agreement.

We need not decide whether the district court properly applied res judicata principles. That is because in Moore v. Local 569, Int'l Bhd. of Elec. Workers, No. 93-56717 (9th Cir.1995), filed on the same day as this disposition, we have reversed the district court's determination in 87-0172B. Thus, the district court's determination in this case must also fall.

E. Attorney's fees on appeal

Local 569 and NECA request attorney's fees incurred in this appeal. This court has discretion to award attorney's fees as a sanction for bringing a frivolous appeal. See Glanzman v. Uniroyal, 892 F.2d 58, 61 (9th Cir.1989). Moore's appeal had merit. Consequently, the request for fees is denied.

Therefore, we affirm in all respects other than dismissal of Moore's complaint on the ground of res judicata, as to which dismissal we reverse and remand for further proceedings.

AFFIRMED in part; REVERSED in part and REMANDED. The parties shall bear their own costs on appeal.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE MOORE,

Plaintiff-Appellant,

and

WALTER F. WHELAN; WALTER F. WOBLAN, JR.,

Plaintiffs,

v.

LOCAL 569 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; PAUL BLACKWOOD; WAYNE LOVIN; JIM WESTFALL; TOM PRIDEMORE, JOE HEISLER; DICK SMITH; TERRY GODSHALK, et al.; ATKINSON MECHANICAL; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; J. J. BARRY; S. R. McCANN; RICHARD ROBBINS; FISCHBACH & MOORE, INC.; SAN DIEGO ELECTRICAL INDUSTRY TRAINING TRUST,

Defendants-Appellees.

No. 93-56717

D.C. No. CV-87-00172-B

ORDER DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING EN BANC

(Filed June 22, 1995)

Before: McKAY,* REINHARDT, and FERNANDEZ, Circuit Judges.

The panel has unanimously voted to deny the appellee Fischbach & Moore's petition for rehearing. The suggestion for rehearing en banc was circulated to the active judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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* Hon. Monroe G. McKay, Senior United States Circuit Judge, United States Court of Appeals for the Tenth Circuit, sitting by designation.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE MOORE, Plaintiff-Appellant, v. LOCAL 569 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; PAUL BLACKWOOD; WAYNE LOVIN; JIM WESTFALL; TOM PRIDEMORE; JOE HEISLER; DICK SMITH; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Defendants-Appellees.	No. 94-55120 D.C. No. CV-85-01719-B ORDER DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING EN BANC (Filed June 22, 1995)

Before: McKAY,** REINHARDT, and FERNANDEZ, Circuit Judges.

The panel has unanimously voted to deny the appellee Fischbach & Moore's petition for rehearing. The suggestion for rehearing en banc was circulated to the active judges of the court, and no judge requested a vote for en banc consideration.

** Hon. Monroe G. McKay, Senior United States Circuit Judge, United States Court of Appeals for the Tenth Circuit, sitting by designation.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Related Parties

Subsidiary Listing	State or Country of Incorporation	Percentage of Voting Securities Owned
Fischbach and Moore, Incorporated	New York	100%
American Rail Systems	Delaware	(1)
The Baldwin-Stewart Electric Company	Connecticut	(1)
Beach Electric Co., Inc.	New Jersey	(1)
Buffalo Electric Construction Co., Inc.	New York	(1)
W. A. Chester, Inc.	New York	(1)
The W.W. Clark Corporation	Ohio	(1)
Corbin-Dykes Electric Company	Arizona	(1)
County Electric Company, Inc.	New York	(1)
Fischbach and Moore of Alaska, Inc.	Alaska	(1)
Fischbach and Moore Electrical Contracting, Inc.	Delaware	(1)
T. H. Green Electric Co., Inc.	New York	(1)
Jaymar Electric Inc.	Michigan	(1)
W. V. Pangborne and Co., Inc.	Delaware	(1)
A. S. Shulman Electric Company	Illinois	(1)
Watson Flagg Electric Co., Inc.	Indiana	(1)
791597 Ontario, Inc.	Canada	100%

Fischbach and Moore of Canada, Ltd.	Canada	(2)
Fischbach and Moore International Corp.	Delaware	100%
Fischbach and Moore International Corp., S.A.	New York	(3)
Fischbach and Moore Worldwide Corp.	Delaware	(3)
F&M Global Communications, Inc.	Texas	100%
Fischbach Information Services, Inc.	Colorado	100%
Fischbach Technical Services, Inc.	Delaware	100%
Fischbach Accounting Services, Inc.	Delaware	100%
Fischbach Properties, Inc.	Delaware	100%
Fischbach Televenture Corp.	Delaware	100%
Heath and Company	California	100%
Mercury Company of Norwood, Inc.	Massachusetts	100%
Moran Company	California	100%
Hackett Environmental Systems, Inc.	Nevada	(7)
Moran Construction Company	California	(12)
Moran Constructors, Inc.	California	(7)
William J. Moran Devel. Corp.	California	(7)
Moran Management Corp.	California	(7)
William J. Moran Co.	California	(7)
Natkin Group, Inc.	Delaware	100%
Natkin & Company	Missouri	(4)

Natkin Sheet Metal Company	Delaware	(4)
Natkin Service Company	Missouri	(4)
NCO Inc.		(5)
Natkin Energy Management Inc.	Delaware	(10)
Fuel Economy Contracting Company	Minnesota	(4)
The Johansen Company	New Jersey	(5)
FICON Corporation	Delaware	100%
Astron Mechanical, Inc.	Florida	(6)
Associated Mechanical Contractors, Inc.	North Carolina	(6)
Electricon, Inc.	Delaware	(6)
EMKO Corp.	Utah	(6)
Frey Mechanical Contractors	Texas	(6)
KenMor Electric Company, Inc.	Texas	(6)
MCI Constructors, Inc.	Delaware	(6)
Northern Electrical	Colorado	(6)
Balatech Group, Inc.	Delaware	(11)
Balatech Corporation	Delaware	100%
Fischbach San Diego Properties, Inc.	California	100%
Fischbach Woodland Hills Properties, Inc.	California	100%
Fischbach Florida Properties, Inc.	Florida	100%
Fischbach Michigan Properties, Inc.	Michigan	100%
F/N Group, Inc.	Delaware	100%
Fischbach/Natkin, Inc.	Delaware	(8)
F/N Contracting, Inc.	Delaware	(8)
Fischbach/Natkin of Canada, Ltd.	Canada	(9)
Power Systems, Inc.	Illinois	100%

FOOTNOTES:

(1) 100% owned by Fischbach and Moore, Incorporated
(2) 70% owned by 791597 Ontario, Inc.
(3) 100% owned by Fischbach and Moore International Corp.
(4) 100% owned by Natkin Group, Inc.
(5) 100% owned by Natkin & Company
(6) 100% owned by FICON Corporation
(7) 100% owned by Moran Company
(8) 100% owned by F.N. Group, Inc.
(9) 50% owned by 791597 Ontario, Inc. and 50% owned by Fischbach and Moore of Canada, Ltd.
(10) 100% owned by Natkin Service Company
(11) 100% owned by Balatech Corporation
(12) 100% owned by Fischbach/Natkin, Inc.